COURT OF APPEALS
DECISION
DATED AND FILED

November 4, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP373-CR **Cir. Ct. No. 2008CF720**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CLIFFORD MORGAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Affirmed*.

Before Vergeront, P.J., Lundsten and Blanchard, JJ.

¶1 PER CURIAM. Clifford Morgan appeals a judgment convicting him of a second or subsequent offense of possession of THC. He also appeals an order denying his motion for a new trial. The issue on appeal is whether Morgan is entitled to a new trial on the grounds of ineffective assistance of counsel or in

the interests of justice, based on references made during the trial to a "repeater charge" and "prior drugs." We conclude that, when weighed against the other evidence presented at trial, the remarks were not significant enough to prejudice Morgan or to prevent the real controversy from being tried. We therefore affirm.

¶2 Green Bay Police Officer David Steffens testified that he stopped Morgan's vehicle after discovering, during a random patrol check, that the license plates were not valid. While following the vehicle, the officer observed a back-seat passenger making movements down toward the floor of the vehicle, causing the passenger's head to disappear from view. These movements raised the officer's suspicions and led him to request backup.

¶3 As the officer approached the vehicle after pulling it over, he observed the driver, Morgan, "moving his body position forward and digging down toward his right buttock cheek in between the center console and the vertical and horizontal areas of where the seat crotch comes together on the seat." The officer did not view the motion as consistent with someone merely reaching for identification because of the repetitive nature of the digging and because, in his experience, most stopped drivers wait to be asked for identification before retrieving it. Meanwhile, both the front and rear-seat passengers continued to make movements toward the floor.

¶4 Officer Steffens and another officer removed all three occupants from the vehicle to conduct pat-down searches for weapons. Thereafter, the other officer drew Officer Steffens' attention to the front seat, where Steffens observed a portion of a clear plastic baggie containing a green plant-like substance. The baggie was on the driver's seat "crotch" area where Morgan had been digging. The contents of the baggie tested positive for THC, the active chemical in

marijuana. Although the baggie was pushed halfway into the crease, "as though it was trying to be concealed," the protruding part was still in plain view and would have touched the pants of anyone sitting in the driver's seat. The officer did not believe the location of the baggie was consistent with the movements being made by either of the vehicle's two passengers.

¶5 The defense brought out that Officer Steffens did not actually observe Morgan in possession of the marijuana, smell any marijuana on him, or discover any additional contraband on Morgan's person. The State Crime Lab was also unable to recover any latent fingerprints from the baggie. Morgan told the officer that the vehicle belonged to a friend of his, and a subsequent search confirmed that Morgan did not own the vehicle.

¶6 In response to a question on cross-examination about what his report showed about the length of the stop, Officer Steffens testified that Morgan was in the back of his squad car only "for the time frame of me issuing a written warning and me informing him that he's not going to be placed in jail on the repeater charge and possession of marijuana, but he'd be referred based on his cooperation." Defense counsel did not raise any contemporaneous objection to the officer's mention of a repeater charge. Instead, defense counsel sought to clarify Steffens' answer with the following exchange:

> Q So, would that be what you have the — the release of Mr. Morgan would be 1:29:56 where you have "three on Morgan and prior drugs?"
>
> A The "three on Morgan" means a triple I, which is a generated —

At that point, the State objected. After an unrecorded sidebar, defense counsel rephrased the question to focus on what the notation revealed as to when Morgan

was released from custody. The jury subsequently convicted Morgan of the drug charge.

¶7 Morgan contends that defense counsel's failure to object to Officer Steffens' unsolicited reference to a "repeater charge," immediately followed by counsel's own mention of "prior drugs," constituted ineffective assistance of counsel. It is well established that a defendant raising an ineffective assistance claim must demonstrate both that counsel's performance was deficient and that the deficient performance prejudiced the defendant. ***State v. Swinson***, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12.

> To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. To satisfy the prejudice prong, the defendant must show that counsel's errors were serious enough to render the resulting conviction unreliable. We need not address both components of the test if the defendant fails to make a sufficient showing on one of them.

Id. (citations omitted).

¶8 As a threshold matter, the parties dispute whether Morgan's prior drug conviction would have been admissible if the State had sought to introduce it. Morgan argues that it was not relevant to an element of the offense, and could not have been used for impeachment since he did not take the stand. The State counters that the conviction could have been admitted as other acts evidence because prior drug activity may be used to establish intent or knowledge on a subsequent drug charge. For the sake of argument, we will assume that evidence of Morgan's prior drug conviction was inadmissible, and that jurors could have

inferred that Morgan had a prior drug conviction based on the remarks of the witness and defense counsel.

¶9 We will further assume, for the sake of argument, that counsel performed deficiently by failing to object to the "repeater charge" reference and by making an additional reference to "prior drugs." The question then is whether Morgan was prejudiced by counsel's performance. We conclude that he was not.

¶10 This case hinged on whether it was reasonable to believe that anyone other than Morgan had placed the baggie of marijuana in the crease of the car's driver's seat, given that a police officer observed Morgan's hand "digging" in the exact area that the baggie was found. We conclude that the verdict in this case was reliable because it is highly unlikely that the jury would have believed that Morgan's "hand digging" was a coincidental attempt to retrieve his identification or some other innocent activity. In order to believe Morgan's account, the jury would have had to accept the proposition that it was reasonable to believe (1) that the car owner or a prior occupant stuffed, but only partially concealed, a banned substance (a bag of marijuana) in the driver's seat, (2) that Morgan failed to notice the bag when he entered the car, (3) that Morgan, unlike most stopped drivers, did not wait for the officer to approach and ask before retrieving his identification, and (4) that Morgan, for some unknown reason, struggled to remove his identification (recall that the officer spoke of the repetitive nature of Morgan's digging) or that Morgan was otherwise engaging in repetitive "digging" unrelated to marijuana in the exact area of the marijuana.

¶11 Accordingly, we conclude that Morgan has failed to demonstrate that he was prejudiced by his counsel's performance.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).